ORIGINAL

EX PARTE OR LATE FILED

ORIGINAL

Bell Atlantic Network Services, Inc.
1320 North Court House Road
8th Floor
Arlington, VA 22201
(703) 974-2944
(703) 525-6436 - FAX

Michael E. Glover
Associate General Counsel

May 26, 2000

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Bell Atlantic Corp. and GTE Corp., CC Docket No. 98-184

Dear Ms. Salas:

This letter is submitted solely to correct the record on one point.

In its May 5 comments, MCI WorldCom claimed (at 9-10) that a recent arbitration award concluded that Bell Atlantic did not comply with the requirement in the Bell Atlantic/NYNEX merger conditions to implement uniform interfaces.

That claim is false. The attached order by the same arbitration panel confirms that the arbitrators reached no such conclusion.

Sincerely,

Michael E. Glover

cc: Ms. J Mikes
Mr. M. Jacobs

Robert B. von Mehren
875 Third Avenue, 25th Floor
New York, New York 10022

May 23, 2000

Via Federal Express
Catherine Kane Ronis, Esq.
Skadden Arps, Slate, Meagher & Flom
1440 New York Avenue., N.W.
Washington, D.C. 20005

Via Federal Express
Jerome L. Epstein, Esq.
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005

Via Federal Express
James F. Bendernagel, Jr., Esq.
Sidley & Austin
1722 Eye Street., N.W.
Washington, D.C. 20005

Re: MCI WorldCom, Inc. and AT&T Co.
v. Bell Atlantic Corporation

Dear Counsel:

The Tribunal has received, reviewed and consulted with respect to Bell Atlantic's Motion dated May 12, 2000 for clarification or modification of the Final Award in Arbitration One. The Claimants have not filed any papers in opposition to this Motion.

On behalf of the Tribunal, I am transmitting to you herewith the Tribunal's unanimous decision with respect to the Motion. In its review of Bell Atlantic's Motion, the Tribunal has noted footnote 5 appearing on page 2. In connection with that footnote, the Tribunal calls counsels' attention to Rule 16 of the CPR Rules relating to Confidentiality.

Very truly yours,

Robert B. von Mehren

Robert B. von Mehren
Chairman

Encls.

20968113v1

cc: Via Federal Express (w/encls.)

Klick, Kent & Allen, Att: Mr. John Klick
Boston Consulting Group, Att: Mr. Todd Hixon

MCI WorldCom, Inc., and AT&T Co.	:	
	:	
Complainants,	:	
	:	Arbitration Conducted
-against-	:	Under the CPR Rules
	:	
Bell Atlantic Corporation.	:	
	:	
Respondent.	:	

ORDER WITH RESPECT TO
MOTION FOR CLARIFICATION
OR MODIFICATION OF
THE FINAL AWARD IN
ARBITRATION ONE

New York, N.Y.
May 23, 2000

Introduction

By its Motion of May 12, 2000, the Respondent has sought clarification or modification of the Final Award dated April 26, 2000 in Arbitration One. By their Response dated May 22, 2000, the Complainants urged that no clarification was necessary and that evidence had been presented that supports the parts of the Award that Bell Atlantic seeks to strike.

Rule 13.5 of the CPR Rules provides in part:

> *"... Within thirty days after the delivery of an award to the parties, the Tribunal may make corrections on its own initiative and corrections requested by either party. All such corrections shall be in writing, and the provisions of Rule 13 shall apply to them.*

Pursuant to Rule 13.5, the Tribunal has considered Bell Atlantic's Motion.

I. DISCUSSION

The basis of the Respondent's request for clarification is that the Final Award might be misconstrued "to suggest that the Panel concluded that Bell Atlantic breached merger condition 2(c)" of the Merger Order in the Bell Atlantic-NYNEX merger case, 12 F.C.C.R. 19985 (1997)[1]. The Respondent requests that such clarification be achieved by modifying the Final Award through the striking of the seven passages set forth in Attachment A to the Motion. The Respondent also urges that the Tribunal does not have jurisdiction to decide whether or not Bell Atlantic breached condition 2(c) of the Merger

[1] See Motion, p. 1.

Order and notes that no evidence on this issue was presented during the hearing of March 10-12, 2000[2].

All Parties agree that the granting or denying of Bell Atlantic's Motion will have no effect on the substance of the Final Award.

The Tribunal fully agrees that its action in granting or denying the Motion will have no significant effect upon the Final Award. But it also agrees that it has no jurisdiction to decide the issue of breach of condition 2(c) and confirms that it did not intend to do so. The references to which the Respondent objects are contained in or relate to the background of the matters decided by the Tribunal in the Final Award. There is, in the Tribunal's view, no imperative reason to modify its Award. Nevertheless, the Tribunal understands the Respondent's concerns and deems it appropriate to modify the Final Award in certain minor respects.

---

[2] Id. at pp. 7-11.

II. MODIFICATIONS TO THE FINAL AWARD

The Tribunal unanimously makes the following modifications to the Final Award:

1. Page 2 - Change the first sentence of the last paragraph on p. 2 to read: *"Bell Atlantic did not comply with this condition as it was construed by the Complainants within the prescribed 15 months which ended November 14, 1998."*

2. Page 3 Change the first sentences of the second full paragraph to read: *"The purpose of the Settlement Agreement was to achieve through cooperation the result contemplated by Condition 2 of the Memorandum Opinion and Order in the Bell Atlantic – NYNEX merger case, 12 F.C.C.R. 19985 (1997) (the Merger Order).*

3. Page 4 Change the second sentence of the first full paragraph to read: *"It is fair to say that the basic purpose of this Settlement Agreement was to establish a process that included both individual actions on the part of each signatory and a collaborative process involving the three parties to the Settlement Agreement to achieve the objective of uniform interfaces between Bell Atlantic and the Complainants.*

4. Page 11, 14-Nov-98. Change the second sentence to read *"The Complainants were of the view that BA had not provided the required uniform interfaces by that date. Settlement Agreement, pp. 2-3."*

5. Page 14 footnote 17. Change the second sentence to read: *It notes, however, that in a sense it had faced such a task since August 14, 1997.*

6. Page 41, full paragraph, fifth sentence: Delete from that sentence, *"an obligation that was originally to mature November 14, 1998".*

III. ORDER

The Tribunal hereby unanimously issues the following Order:

1. Bell Atlantic's Motion for Clarification or Modification is granted to the extent set forth below.

2. The Tribunal hereby unanimously clarifies and modifies the Final Award as set forth at page 3 supra.

3. The Final Award, as so clarified and modified, becomes the Final Award in Arbitration One.

New York, N.Y.
May 23, 2000

John C. Klick
Co-Arbitrator

Todd L. Hixon
Co-Arbitrator

Robert B. von Mehren
Chairman

1. Bell Atlantic's Motion for Clarification or Modification is granted to the extent set forth below.

2. The Tribunal hereby unanimously clarifies and modifies the Final Award as set forth at page 3 supra.

3. The Final Award, as so clarified and modified, becomes the Final Award in Arbitration One.

New York, N.Y.
May 23, 2000

John C. Klick
Co-Arbitrator

Todd L. Hixon
Co-Arbitrator

Robert B. von Mehren
Chairman

1. Bell Atlantic's Motion for Clarification or Modification is granted to the extent set forth below.

2. The Tribunal hereby unanimously clarifies and modifies the Final Award as set forth at page 3 supra.

3. The Final Award, as so clarified and modified, becomes the Final Award in Arbitration One.

New York, N.Y.
May 23, 2000

John C. Kliok
Co-Arbitrator

Todd L. Hixon
Co-Arbitrator

Robert B. von Mehren
Chairman

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.

WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000

FAX: (202) 393-5760

DIRECT DIAL
(202) 371-7209
DIRECT FAX
(202) 371-7978

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
NEW YORK
PALO ALTO
SAN FRANCISCO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

May 12, 2000

BY FEDERAL EXPRESS

Robert B. von Mehren, Esq.
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022

Re: **MCI WorldCom and AT&T Corp. v. Bell Atlantic Corporation**

Dear Mr. von Mehren:

Enclosed is Bell Atlantic Corporation's Motion for Clarification or Modification of Arbitration One Award. Please call if you have any questions.

Sincerely,

Catherine K. Ronis

Catherine Kane Ronis

Enclosures

cc: Mr. Todd Hixon
Mr. John Klick
James Bendernagel, Esq.
Jerome Epstein, Esq.

BEFORE THE ARBITRATION PANEL

MCI WORLDCOM, INC.,	)	
	)	
And	)	Arbitrators: R. von Mehren
	)	T. Hixon
AT&T CORP.,	)	J. Klick
	)	
v.	)	Hearing Dates: March 10-12, 2000
	)	
	)	
BELL ATLANTIC CORPORATION.	)	

MOTION FOR CLARIFICATION OR MODIFICATION OF ARBITRATION ONE AWARD

Catherine Kane Ronis
SKADDEN, ARPS, SLATE
MEAGHER & FLOM, LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Lydia R. Pulley
BELL ATLANTIC CORPORATION
1320 North Courthouse Road
8th Floor
Arlington, VA 22201

Attorneys for Bell Atlantic Corporation

May 12, 2000

TABLE OF CONTENTS

BEFORE THE ARBITRATION PANEL

MCI WORLDCOM, INC.,	)	
	)	
And	)	
	)	Arbitrators: R. von Mehren
AT&T CORP.,	)	T. Hixon
	)	J. Klick
v.	)	
	)	Hearing Dates: March 10-12, 2000
	)	
BELL ATLANTIC CORPORATION.	)	

MOTION FOR CLARIFICATION OR MODIFICATION OF ARBITRATION ONE AWARD

INTRODUCTION

Bell Atlantic respectfully seeks clarification or modification of the Panel's Award in the Arbitration One proceeding, issued on April 26, 2000. Various dicta in the Panel's Award can be read (incorrectly) to suggest that the Panel concluded that Bell Atlantic breached merger condition 2(c).[1] The Panel should strike these dicta and make it clear that it did not intend to rule on this issue. Indeed, such a ruling would directly conflict with the Settlement Agreement, which makes clear that, with respect to this issue, the parties *agreed to disagree,* set the issue aside, and pursue an amicable solution. In fact, the Agreement explicitly states that Bell Atlantic denies that it breached merger condition 2(c) and that the existence of the Agreement is not a concession by Bell Atlantic of liability.[2] As part of the settlement, AT&T/MCIW expressly committed not to claim that the Settlement Agreement "raises any inference or implication that

---

[1]The specific portions of the Panel's Award to which Bell Atlantic objects are set forth in Exhibit A to this motion.

[2] "[T]his settlement is not, and shall not be construed as, an admission by Bell Atlantic of any issue of fact or law alleged in the Complaint." Settlement Agreement §11.1.

Bell Atlantic has breached Condition 2(c)."[3] In short, the parties agreed to forego a ruling on whether merger condition 2(c) was breached in exchange for the terms and obligations of the Settlement Agreement.

Moreover, the Panel does not have subject matter jurisdiction to rule on whether Bell Atlantic breached merger condition 2(c) because its authority is limited to the issues the parties agreed to submit to arbitration. It cannot address an issue about which the parties expressly agreed to disagree and put aside for purposes of settling the dispute. AT&T/MCIW, knowing the bargain they struck with Bell Atlantic, never identified the issue for this arbitration, nor did they submit any evidence on the issue during the proceeding. Not only is there no record evidence to support a finding that Bell Atlantic breached merger condition 2(c), Bell Atlantic was plainly deprived of fair notice and the opportunity to be heard on this issue.

The Panel should therefore strike the portions of the Award that may mistakenly be read to suggest that the Panel concluded that Bell Atlantic breached merger condition 2(c). These portions address matters not submitted to the Panel, are contrary to the Settlement Agreement, were made without fair notice, and are prejudicial to Bell Atlantic. It is exactly the type of language that New York arbitration law and the Federal Arbitration Act contemplate can and should be modified by the Panel.[4] Indeed, MCIW has already cited this Award in the current FCC proceeding regarding the proposed Bell Atlantic/GTE merger.[5]

---

[3] Settlement Agreement §11.1.

[4] NY CPLR 7509, 7511 (c)(2) ("The Court shall modify the award if . . . the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted . . ."); *see also* Federal Arbitration Act, 9 U.S.C.A §11.

[5] *See* MCIW FCC Br. at 9 ("Although the Commission imposed the uniform interface condition on Bell Atlantic in 1997, it was only one week ago (on April 26, 2000) that WorldCom's and AT&T's efforts culminated in an arbitration award finding that Bell Atlantic violated its obligations with respect to uniform interfaces.") (filed in CC Docket No. 98-184, May 5, 2000).

ARGUMENT

I. THE PANEL SHOULD MAKE IT CLEAR THAT IT DID NOT INTEND TO CONCLUDE THAT BELL ATLANTIC BREACHED MERGER CONDITION 2(C).

The Panel could not have intended to suggest that Bell Atlantic breached the underlying merger condition because doing so would contradict the express terms of the Settlement Agreement. In the litigation leading up to the Settlement Agreement, the crux of the parties' dispute revolved around whether the requirement in merger condition 2(c) that Bell Atlantic use "commercially reasonable" efforts to implement "uniform interfaces" also required it to use commercially reasonable efforts to implement uniform business rules.[6] Bell Atlantic argued that it clearly did not, and that merger condition 2(c) obligated it only to provide uniform methods of "connecting" to Bell Atlantic. AT&T/MCIW disagreed, arguing that Bell Atlantic also had to make all of the fields and formatting on the orders submitted over these "connections" uniform.[7] Significantly, there was virtually no dispute between the parties that Bell Atlantic implemented uniform "interfaces" by November 18, 1998, as Bell Atlantic defined the term.[8] The issue essentially boiled down to whether Bell Atlantic had to provide uniform business rules ***in addition*** to "uniform interfaces."[9]

---

[6] The text of merger condition 2(c) is set forth in the Settlement Agreement at 1.

[7] Bell Atlantic, for example, demonstrated in its Answer filed with the FCC that the FCC had routinely distinguished the terms "interfaces" and "business rules" in various orders issued contemporaneously with the Merger Order, and therefore its failure to include the term "business rules" in the Bell Atlantic/NYNEX merger order is clear evidence that uniform business rules were not required. Ex. PP at 12-16 (Answer of Bell Atlantic). Bell Atlantic also explained that the FCC could not have intended to impose a requirement to implement uniform business rules because such implementation would have been impossible to accomplish within ***15 months*** – the period between the Merger Order and the November 1998 deadline. This argument is further supported by the fact that the FCC specifically distinguished between interfaces and business rules in its October 1999 order approving the SBC/Ameritech merger and giving the merged company ***30 months*** to implement uniform business rules. *In re Applications of Ameritech Corp et al.*, CC Docket No. 98-141, FCC 99-279 at 757 (rel. Oct. 8, 1999). Bell Atlantic will not repeat all of the arguments it made to the FCC here, and instead refers the Panel to its Answer.

[8] AT&T/MCIW did argue that Bell Atlantic failed to implement a uniform interface for repair and maintenance, but

Only a few weeks prior to trial, each party determined that it was in its best interest to settle the matter. The Panel, however, mistakenly concluded that the Settlement Agreement resolved the issue of whether Bell Atlantic breached merger condition 2(c).[10] But the Settlement Agreement does not state that the parties agreed that Bell Atlantic had breached the merger condition. In fact, the opposite is true. It is clear from the language of the Settlement Agreement that the parties *agreed to disagree* on whether Bell Atlantic had breached the merger condition.

First, the Preamble, which the Panel cites to support its dicta that suggests Bell Atlantic breached merger condition 2(c), merely provides the background of the Agreement, explaining the history of the dispute, as well as Bell Atlantic's reason for settling. The Preamble, for example, recites the terms of merger condition 2(c) and repeats the allegations in AT&T/MCIW's FCC Complaint that Bell Atlantic breached this condition. Indeed, this provision clearly states that the "Complainants contend" that Bell Atlantic breached the merger condition – it is by no means proof that Bell Atlantic actually did breach the merger condition or that Bell Atlantic concedes that it breached this condition.

More importantly, the very next paragraph states that Bell Atlantic ***denies*** these allegations:

> WHEREAS, Bell Atlantic has ***denied*** all such claims and ***contends that it has fully met Merger Condition 2(c)*** by using all commercially reasonable efforts to implement prior to November 1998 uniform interfaces (both application-to-application and GUI-

---

that dispute is not relevant here.

[9] As Bell Atlantic explained in its Answer, Bell Atlantic's implementation of uniform interfaces (as defined by the FCC in previous orders) provided enormous benefits to the CLECs. Prior to the merger, Bell Atlantic and former NYNEX had several different application-to-application and WEB GUI-based interfaces. Ex. PP, Att. A (Answer of Bell Atlantic). After expending considerable resources, Bell Atlantic implemented uniform interfaces by November 1998.

[10] *E.g.*, Award at 3, 11 (citing preamble and page 2 of the Settlement Agreement); *see also* Exhibit A, attached hereto, which lists all of the Panel's statements regarding Bell Atlantic's breach of the merger condition.

> based) across its region for each of the OSS functions and that Merger Condition 2(c) does not require implementation of uniform business rules (the "Dispute"), but that in any event Bell Atlantic contends that it is already in the process of pursuing uniformity of its business rules . . .[11]

The very purpose of this provision was to make it clear that Bell Atlantic denied that it was required to provide this uniformity under merger condition 2(c), and was settling the dispute because it was already moving towards providing the very uniformity sought by AT&T/MCIW.

Second, the parties included language in Section 11.1 to make clear that Bell Atlantic was not conceding that it violated merger condition 2(c) by entering into the Agreement, and that AT&T/MCIW agreed not to argue otherwise in any proceeding:

> Bell Atlantic's entry into this settlement is not, and shall not be construed as, an admission by Bell Atlantic of any issue of fact or law alleged in the Complaint. MCI WorldCom and AT&T shall not assert in any proceeding or public forum that by settling this complaint, Bell Atlantic has conceded in this proceeding that it has breached Condition 2(c), or that the existence of the settlement raises any inference or implication that Bell Atlantic has breached Condition 2(c).[12]

Finally, as part of the Settlement, and for purposes of this arbitration only, Bell Atlantic agreed to define "interfaces" to include "business rules." The Agreement provides:

> For the purpose of this Agreement ***only***, the term "interface" is defined to include the following components: business rules (including, *e.g.*, business functionality, fields, and valid values), data format specifications, and transport and security protocols for each function.[13]

To ensure that no party ever argued that Bell Atlantic had conceded that "interfaces" included "business rules," Bell Atlantic insisted that the following footnote be added to the Agreement:

---

[11] Settlement Agreement at 2 (emphasis added).

[12] Settlement Agreement §11.1.

> Bell Atlantic does not agree that the term "interface" includes business rules, but has agreed to this definition for the purpose of this Agreement only. In particular, Bell Atlantic does not agree that the term "interface" as used in the Merger Order includes business rules.[14]

The purpose of the Agreement was to ***end*** the parties' dispute over Bell Atlantic's obligations under this condition and to establish a process for achieving the uniform business rules sought by AT&T/MCIW – an objective that Bell Atlantic was already pursuing.[15] Indeed, AT&T/MCIW agreed – as part of the bargain they struck with Bell Atlantic – to ***forgo*** a decision on whether Bell Atlantic breached this condition in exchange for Bell Atlantic's agreement to provide uniform business rules.[16]

The Panel should therefore make it clear that it did not intend to reach a conclusion regarding whether Bell Atlantic breached merger condition 2(c) by striking the portions of the Award set forth in Attachment A. These portions are dicta and striking them will have no effect on the underlying award.[17] Bell Atlantic's request therefore meets the requirements under New York law and the Federal Arbitration Act for modifying arbitration awards.[18]

---

[13] Settlement Agreement §2.1 (emphasis added)

[14] Settlement Agreement at n.1.

[15] For example, prior to the Settlement Agreement, Bell Atlantic had published draft business rules which, when implemented, provided much of the uniformity sought by AT&T/MCIW. EX. PP at 18-20 (Answer of Bell Atlantic). After the Agreement was signed, Bell Atlantic finalized these business rules and began the process of changing its code to conform to these business rules.

[16] Settlement Agreement §1.1. Notably, this arbitration is only about whether Bell Atlantic implemented the uniform "business rules" – the February LSOG 4 – as required under the Agreement. Whether Bell Atlantic has implemented uniform "interfaces" – as Bell Atlantic defined the term in the FCC proceeding – has never been an issue in this arbitration.

[17] *See Hormel Foods Corp. v. Jim Henson Prod., Inc.*, 73 F.3d 497, 508 (2nd Cir. 1996) (internal citations omitted) ("'Dictum' generally refers to an observation which appears in the opinion of a court which was 'unnecessary to the disposition of the case before it.' ... It is a 'statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.").

[18] *See* NY CPLR 7511 (c)(2).

II. THE PANEL DOES NOT HAVE SUBJECT MATTER JURISDICTION TO DECIDE WHETHER BELL ATLANTIC BREACHED MERGER CONDITION 2(C).

Not only would it be wrong to conclude that the Settlement Agreement means that Bell Atlantic breached the merger condition, but the Panel also could not have intended to suggest that it had reached such a conclusion for the simple reason that it does not have jurisdiction to make such a finding. The United States Supreme Court has warned that arbitration is a matter of contract and a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (holding that arbitrators, not courts, must interpret arbitration agreements to determine what may be arbitrated); *see also 152 West 58th Street Owners Corp. v. Local 32B-32J*, 129 A.D.2d 439 (N.Y. App. Div. 1987).[19]

The Settlement Agreement plainly did not delegate to this Panel the authority to decide whether Bell Atlantic breached merger condition 2(c) – this was an issue the parties agreed to put aside in their settlement. As part of the bargain, the parties agreed to submit only the following issues to arbitration:

- Whether Bell Atlantic agreed in the collaboratives to provide the uniformity required by Section 2 of the Agreement;[20]
- Whether Bell Atlantic can provide uniform interfaces without reducing flow-through;[21]

---

[19] *See also Consolidated Edison v. Gallagher*, 1972 WL 16630, *2 (N.Y. Sup. Ct.) ("The law is well established that the power of arbitrators is limited by the terms of submission, and that an award which exceeds the scope of the submission will be vacated.").

[20] *See generally* Settlement Agreement §5.

[21] *Id.* §2.4.

- Whether a Bell Atlantic proposal to address the impact of uniformity on current interfaces (if any) is reasonable;[22]
- Whether Bell Atlantic met its obligation to provide adequate business rules documentation;[23]
- Whether Bell Atlantic met the deadlines for providing uniform interfaces and business rules set forth in Section 6;[24]
- Whether a Bell Atlantic request for an extension of these deadlines satisfies the requirements in Section 6.5 of the Agreement; and
- Whether a Bell Atlantic proposal to implement additional changes to the interface identified during implementation of the deadlines in Section 6 is reasonable.[25]

No provision of the Agreement confers subject matter jurisdiction on the Panel to determine whether Bell Atlantic breached merger condition 2(c). The Panel should, therefore, strike those portions of the Award pertaining to the question of whether Bell Atlantic breached this condition.

---

[22] *Id.* §2.4.
[23] *Id.* §5.3.
[24] *See generally id.* §9.
[25] *Id.* §7.7.

III. AT&T/MCIW PRESENTED NO EVIDENCE DURING THE PROCEEDING ALLEGING THAT BELL ATLANTIC BREACHED MERGER CONDITION 2(C).

Finally, the Panel could not have intended to suggest that it had concluded that Bell Atlantic breached the merger condition because that issue was not the subject of this arbitration. AT&T/MCIW did not identify this issue for arbitration (and could not under the terms of the Settlement Agreement), nor did they present any evidence on this issue during the proceeding. Their request for arbitration identified only issues pertaining to Bell Atlantic's alleged failure to implement the February LSOG 4 release as required under the Settlement Agreement.[26] In fact, AT&T/MCIW ***never*** asked the Panel to rule on whether Bell Atlantic breached the merger condition. AT&T/MCIW mentioned this condition only in describing the background of the Settlement Agreement and the allegations in their FCC complaint. Thus, for this additional reason, the Panel lacks the authority to decide this issue in this proceeding because the parties did not present it to them. *See Retail Store Employees Union Local 782 v. Sav-On Groceries*, 508 F.2d 500, 502-03 (10th Cir. 1975) (holding that the "arbitrator was restricted to deciding only those issues submitted" by the parties);[27] *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 287 (S.D.N.Y. 1991) (holding that arbitration awards may be modified if the arbitrators have awarded on a matter not submitted to them) (citing NY CPLR 7511 (c)); *Denihan v. Denihan*, 97 A.D.2d 69, 73, 468 N.Y.S.2d 614, 617 (N.Y. App. Div. 1983) (holding that if the lower court determined on remand that arbitrators resolved an issue not submitted to them, they would have exceeded their authority and the award would be subject to vacatur).[28]

---

[26] *See* Ex. H (letter from AT&T to Bell Atlantic dated February 16, 2000).

[27] The court in *Retail Store* was interpreting Section 11 of the Federal Arbitration Act, which is virtually identical New York law on modifying arbitration awards. In fact, the Federal Arbitration Act is modeled after New York law. *See Florasynth v. Pickholz*, 750 F.2d 171, 175 (2nd Cir. 1984).

[28] *See also* A*malgamated Watch Workers Union v. Jaeger Watch Co.*, 270 A.D. 802 (N.Y. App. Div. 1946)

It is also well established that the parties to an arbitration proceeding are entitled to notice and an opportunity to be heard. *E.g., Beckman v. Greentree Sec. Inc.*, 87 N.Y.2d 566, 570 (1996) (holding that the "due process right to notice and opportunity to defend" in an arbitration requires that notice be reasonably calculated to apprise parties of the action and "afford them an opportunity to present their objections.").[29] The CPR rules, moreover, require "[t]he early identification and narrowing of the issues in the arbitration," (CPR Rule 9.4.b), and a "pre-hearing memorandum including ... a statement of each claim being asserted." CPR Rule 11.1.b. Bell Atlantic was plainly deprived of fair notice and an opportunity to be heard on the issue of whether it breached merger condition 2(c).[30]

Finally, the Panel could not have intended to conclude that Bell Atlantic breached this condition because the Award fails to address the necessary requirements of this condition. To find that Bell Atlantic breached the merger condition, the Panel would have had to find (1) the term "interfaces" in the FCC's Merger Order included "business rules" (contrary to the FCC's prior distinctions between interfaces and business rules),[31] and (2) that Bell Atlantic failed to use "commercially reasonable" efforts to implement uniform "business rules." The record contains

---

(modifying an award by deleting certain paragraphs which went beyond the matters submitted for arbitration but which did not affect the merits of the decision and therefore the award); *In re Board of Ed. Union Free School Dist.*, 104 A.D.2d 412 (N.Y. App. Div. 1984) (approving an arbitrator's "letter decision" which modified the original award on the ground that "it inadvertently also appeared to address matters not submitted for arbitration.").

[29] *See also Lackwanna Leather Co. v. United Food Workers Int'l Union*, 692 F.2d 536, 539 (8th Cir. 1982) (holding that "adequate notice of the issues is a prerequisite to a fundamentally fair hearing, for without such notice the parties would be effectively denied an opportunity to prepare and present their case at arbitration."); *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d. 649, 651 (5th Cir. 1979) (vacating an arbitration award because party was not given fair notice of issues decided by the arbitrators); *Goldman Bros .v. Local 32K*, 166 N.Y.S.2d 19, 21-22 (1957) (setting aside arbitration award because one party "could not reasonably [have been] expected to assume that the hearing would involve [a certain] issue.").

[30] Bell Atlantic noted in its Post-Hearing Brief that the issue of whether it breached this merger condition was not relevant to this proceeding. Post-Hearing Br. at 4. AT&T/MCIW did not dispute Bell Atlantic's claim in its Post-Hearing Reply Brief.

[31] *See* Ex. PP at 12-16 (Answer of Bell Atlantic) (citing SBC/Ameritech merger conditions, FCC 99-279, CC Docket No.

absolutely no evidence to support either of these findings.[32] It is well settled that an arbitration award may be set aside "if the record reveals no support whatever for the arbitrator's determinations." *Favara, Shakan, Tabaczyk, Ltd. v. Ewing*, 1992 WL 80659, *3 (S.D.N.Y. 1992) (quoting *Swift Indep. Packing Co., v. District Union Local One*, 575 F. Supp. 912, 917 (N.D.N.Y. 1983)). The portions of the Award relating to Bell Atlantic's breach of merger condition 2(c) must therefore be stricken.

CONCLUSION

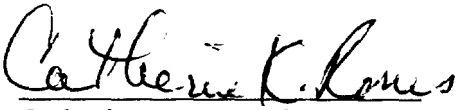
The Panel should strike the portions of the Award that could mistakenly be read to suggest that the Panel concluded that Bell Atlantic breached this merger condition 2(c).[33] The Settlement Agreement makes it clear that the issue of whether Bell Atlantic breached merger condition 2(c) was *intentionally* left unresolved. In any event, any finding that Bell Atlantic breached this condition would exceed the scope of the Panel's authority. AT&T/MCIW, moreover, did not identify this issue for arbitration, nor did they present any evidence on this issue in the proceeding, and Bell Atlantic was therefore plainly deprived of fair notice and an opportunity to be heard on this issue.

98-141, §§26 and 31).

[32] Indeed, the parties were prepared to present numerous witnesses at the FCC hearings, which AT&T estimated would last at least one week. For example, Bell Atlantic was prepared to introduce the testimony of the Bell Atlantic representatives who negotiated the merger conditions with the FCC to demonstrate that merger condition 2(c) did not require uniform business rules. The FCC staff granted AT&T/MCIW's motion to exclude these witnesses; Bell Atlantic appealed this decision to the full Commission. The parties reached agreement before the appeal was decided.

[33] For the Panel's convenience, a copy of the Award with the objectionable material deleted is attached at Attachment B. Bell Atlantic deleted (or slightly revised) only the portions of the Award set forth in Attachment A.

Respectfully submitted,



Catherine Kane Ronis
SKADDEN, ARPS, SLATE
MEAGHER & FLOM, LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7209

Lydia R. Pulley
BELL ATLANTIC CORP.
1320 North Court House Road
8th Floor
Arlington, Virginia 22201

May 12, 2000